use of the team to him, claiming that in the absence of malice the measure of damages in trover in such cases is the value and interest. Plaintiff had judgment for $225 for the value of the team and $375 for the value of their use to him as a market gardener, of which he had been deprived by the levy. On error by defendants, the Court of Appeals *held* that the value and interest would be inadequate compensation, reasoning that the value and interest is merely the presumptive damages in absence of proof of more or less; but the court considered that the recovery was excessive, because the value should have been computed on rental value by the month or year, and not by the day. *Railey et al.* v. *Hopkins* (1908), — Tex. Civ. App. —, 110 S. W. 779.

In cases of wrongful sales on execution it has quite generally been held that, in the absence of malice, the true measure of damages to the owner in trover is not the retail value [*State ex rel Hayden* v. *Smith* (1862), 31 Mo. 566], but the fair market value [*Pope* v. *Benster* (1894), 42 Neb. 304, 60 N. W. 561, 47 Am. St. Rep. 703; *Gibson* v. *Stevens* (1834), 7 N. H. 352; *Cleveland* v. *Tufts* (1888), 69 Tex. 580, 7 S. W. 72], with interest [*Spencer* v. *Brighton* (1860), 49 Me. 326; *Murphy* v. *Sherman* (1878), 25 Minn. 196; *Walker* v. *Borland* (1855), 21 Mo. 289; *State ex rel Hayden* v. *Smith* (1862), 31 Mo. 566; *Felton* v. *Fuller* (1857), 35 N. H. 226;], and such special damages in addition as the facts may show [*Felton* v. *Fuller* (1857), 35 N. H. 226; *Anderson* v. *Sloane* (1888), 72 Wis. 566, 40 N. W. 214, 7 Am. St. Rep. 885], though more than they sold for. [*Thompson* v. *Thompson* (1793), 1 N. J. L. (Coxe) 159; *Rogers* v. *Fales* (1847), 5 Pa. St. (5 Barr) 154.] In trover for levy and sale of a team worth $267 and known by defendant to be exempt a verdict for $435.59 was held not excessive. *Lynd* v. *Picket* (1862), 7 Minn. 184 (Gil. 128), 82 Am. Dec. 79. A similar case was *Elder* v. *Frevert* (1884), 18 Nev. 446.

DEEDS—DISTINGUISHED FROM WILLS—POWER OF DISPOSITION RESERVED.—An instrument in the form of a deed was executed, duly acknowledged and recorded, purporting to grant, bargain and sell and convey land to a grantee, reserving to the grantor a life estate, together with the power "to mortgage, incumber, sell, lease, convey or otherwise dispose of said real estate," and containing a recital and condition that in case the grantee should die before the grantor, the estate conveyed should revert to the grantor. *Held,* that such instrument is not testamentary in character, but is a deed, conveying a present title to the grantee, subject to a life estate in the grantor, the reservation of the power of disposition referring to the reserved life estate. *Brady* v. *Fuller et al.* (1908), — Kan. —, 96 Pac. 854.

On the particular question as to the effect of a reservation of the power of disposition of the estate conveyed, the cases are at variance, but the weight of authority seems to be against the construction adopted in this case. That where the grantor reserves to himself the use and enjoyment and also the power of disposition, during his life, of the estate granted, the instrument conveys no present interest, and is consequently testamentary in character, has been held in the following cases: *Ellis* v. *Pear-*

son, 104 Tenn. 591, 58 S. W. 318; *Lacy* v. *Comstock,* 55 Kan. 86, 39 Pac. 1024; *Kelleher* v. *Kernan,* 60 Md. 440; *Roth* v. *Michalis,* 125 Ill. 325, 17 N. E. 809; *Stroup* v. *Stroup,* 140 Ind. 179, 39 N. E. 864, 27 L. R. A. 523. The law of Kansas on this point rests mainly upon two cases: *Lacy* v. *Comstock,* supra, and *Durand* v. *Higgins,* 67 Kan. 110, 72 Pac. 567. In the former case the decision rests upon the invalidity of the instrument as a deed of conveyance, yet the case is disregarded by the court in *Durand* v. *Higgins* as having been decided on another ground. The case last named is decided upon the theory that the reservation of the power of disposition is repugnant to the main object of the grant, and is therefore invalid. This is substantially an application of the rule of construction that the intention of the grantor is to be gathered from the instrument as a whole. In applying this rule, much reliance is placed upon the recital in the instrument that in case the grantee should die before the grantor, the estate should revert, as indicating an intention on the part of the grantor to convey a present interest.

DEEDS—RESERVATION OF RIGHT OF ACTION FOR DAMAGES—LIABILITY OF SUBSEQUENT VENDEE.—Plaintiff conveyed land, reserving in her deed all right of action against a railroad company for damages to her easements of light, air, and access, the action against the railroad company having already been commenced. The reservation clause stipulated that the grantees should sign and execute any and all releases which might be required. A formal agreement was also executed by the grantees, to the effect that, in case they should sell the premises, they would procure from their vendees agreements assuming their obligations to execute releases, and that each subsequent owner should be compelled so to do. This agreement contained the stipulation: "But this agreement shall not be construed in any manner as a lien or incumbrance, or binding or affecting said described premises." Defendants held title through several mesne conveyances, that by which they acquired title, however, containing no reservation or mention of the agreement. In this action to compel defendant to execute a release, or to have the amount of plaintiff's recovery declared a lien upon the premises, *held,* that defendants should be required to execute the release. *Maurer* v. *Friedman et al.* (1908), 110 N. Y. Supp. 320.

There seems to be no authority, outside of New York, precisely in point. In *Western Union Tel. Co.* v. *Shepard,* 169 N. Y. 170, 62 N. E. 154, 58 L. R. A. 115, it was held, upon a similar state of facts, but where the defendant was the plaintiff's grantee, that if the grantee collected damages, he would hold them in trust for his grantor. The reservation, however, was held to be ineffectual to preserve any right of action in favor of the grantor against the railroad company, since title to the easements passed by the grant. In *Schomacker* v. *Michaels,* 189 N. Y. 61, 81 N. E. 555, the action was, as in the principal case, against a subsequent grantee, but as the case was before the Court of Appeals on another ground, the main question was not there decided. It was held, however, that the action was one involving title to real estate, and one in which a *lis pendens* might